U.S. Department of Labor

Office of Administrative Law Judges
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In the Matter of:	:	
	:	
WILLIAM L. TAPPER,	:	
Claimant,	:	**Date: Sept. 15, 2000**
	:	
v.	:	**Case No. 1999-BLA-0069**
	:	
DOVERSPIKE BROTHERS, INC./	:	
DOVERSPIKE BROTHERS COAL COMPANY,	:	
Employers,	:	
	:	
INTERNATIONAL BUSINESS & MERCANTILE	:	
REASSURANCE CO.,	:	
Insurer, and	:	
	:	
DIRECTOR, OFFICE OF WORKERS'	:	
COMPENSATION PROGRAMS,	:	
Party-in-Interest.	:	

Appearances:

Philip L. Wein, Esq., Clarion, PA, for the Claimant

Martha Zeigler Eberhardt, Esq., Bechtol, Lee & Eberhardt, Pittsburgh, PA, for Doverspike Brothers, Inc. and Old Republic Insurance Co.

Anthony G. O'Malley, Jr., Esq., Office of the Regional Solicitor, U. S. Department of Labor, Philadelphia, PA, for the Director

Before: PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER GRANTING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901, ***et seq.*** (hereafter "the Act"). The pertinent implementing regulations

appear at Parts 718 and 725 of Title 20 of the Code of Federal Regulations, as the claim was filed after March 31, 1980. ***See*** 20 C.F.R. §§ 718.2, 725.4.[1]

Benefits are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of coal miners who died from pneumoconiosis. ***See*** 20 C.F.R. § 725.1(a). Pneumoconiosis, commonly known as "black lung disease," is a chronic disease of the lungs and its sequelae (including respiratory and pulmonary impairments) resulting from coal mine employment. ***See*** 20 C.F.R. § 725.101(a)(20). ***See also*** 20 C.F.R. Part 718.

Following notice to all interested parties, a formal hearing was held before the undersigned administrative law judge in this matter on June 17, 1999 in Johnstown, Pennsylvania, in accordance with pertinent portions of 20 C.F.R. Part 725 and 29 C.F.R. Part 18.[2] Prehearing reports were submitted by the Claimant William Tapper ("Claimant"), by Doverspike Brothers, Inc. and Old Republic Insurance Company ("Employer" or "Employer/Carrier"), and by the Director, Office of Workers' Compensation Programs ("Director"). Each of the parties was afforded an opportunity to present evidence and make arguments at the hearing. Claimant and his wife Doris testified. (Tr. 29-104). At the hearing, Director's Exhibits 1 through 62 (hereafter "DX 1" through "DX 62"), Claimant's Exhibits 1 through 3 ("CX 1" through "CX 3") and Administrative Law Judge Exhibit 1 ("ALJ 1")[3] were admitted into evidence (Tr. 17-23, 34-36, 94-95). The record was kept open for a period of ninety days and briefing was to be completed thereafter.

Following the hearing, additional evidence was submitted, consisting of: (1) a July 1, 1999 medical examination report by Guy H. Gerhart, M.D. (with accompanying pulmonary function and arterial blood gas test results) and a June 14, 1999 x-ray report by Robert J. Boron, M.D., together with the curricula vitae of Drs. Gerhart and Boron, transmitted under Mr. O'Malley's cover letter of July 27, 1999 (which was identified at the hearing, Tr. 22-23, and which has been designated as "DX 63"); (2) a July 18, 1999 reading of a June 10, 1999 x-ray of Shiv Navani, M.D., together with Dr. Navani's curriculum vitae, transmitted under Mr. O'Malley's cover letter of August 11, 1999 (which has been designated as "DX 64"); (3) correspondence from John B. Bechtol, Esq., dated

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[1] The Act was adopted as Title IV of the Federal Coal Mine Health and Safety Act of 1969, and was amended by the Black Lung Benefits Act of 1972, the Black Lung Reform Act of 1977, the Black Lung Benefits Revenue Act of 1981, and the Black Lung Benefits Amendments of 1981. The pertinent amendments are discussed in 20 C.F.R. § 725.1.

[2] References to the transcript of the formal hearing conducted on June 17, 1999, appear as "Tr." followed by the page number.

[3] ALJ 1 consisted of notes referred to by Claimant during his testimony. Copies of the exhibit were distributed to the parties by the undersigned following the hearing.

September 27, 1999 (which has been designated as “ALJ 2"); (4) a statement supplementing Dr. Levine’s curriculum vitae [at DX 34], transmitted under Mr. Wein’s cover letter of September 10, 1999 (which has been designated as “DX 34A”); and (5) the transcript of an August 9, 1999 deposition by John T. Schaaf, M.D., transmitted under Mr. Wein’s cover letter of September 10, 1999 (which was identified at the hearing [Tr. 18-20] and which has been designated as “CX 4"). Although the undersigned’s Order of June 10, 1999 left the record open for the submission of rebuttal evidence, including a deposition by Dr. Gregory Fino, which was identified at the hearing as Employer’s Exhibit 1 (“EX 1") [Tr. 11, 23], no additional evidence was submitted by the Employer. Accordingly, DX 63, DX 64, ALJ 2, DX 34A, and CX 4 are hereby admitted into evidence, and the record is closed. **SO ORDERED.**

By my Order of November 10, 1999 briefs were due to be filed on January 17, 2000. However, on November 29, 1999, Counsel for the Chapter 7 Trustee for the Defendants Doverspike Brothers, Inc., and Doverspike Brothers Coal Company ("Employers") filed a Plea in Abatement in which the Trustee noted that the Employers filed for protection from their creditors as voluntary Chapter 11 bankruptcies on August 31, 1998, but that they were converted to Chapter 7 bankruptcies on August 1, 1999 in the United States Bankruptcy Court for the Eastern District of Kentucky, Lexington Division (Case Nos. 98-52195 and 98-52190). The Trustee argues that "[p]ursuant to 11 U.S.C. §362, said bankruptcy filings act as an automatic stay on all actions in all courts and in all jurisdictions against the Debtors or their property." In an "Answer to Plea in Abatement Received by Phillip L. Wein, Esq., on November 29, 1999", filed on December 2, 1999, Claimant, through counsel, submitted the September 27, 1999 correspondence from Employers' (and Insurer's) counsel (designated above as “ALJ 2") indicating that there was coverage for Claimant's claim under a policy issued to the employer with Federal ID number 25-1142646 (listed on the Social Security printout as Doverspike Brothers Coal Company) by International Business & Mercantile. Claimant argued that because of the coverage he should be permitted to proceed with his claim. I issued an Order Requesting Response and Staying Proceedings on January 6, 2000. In that Order, I directed the counsel for the Employers/Insurer and for the Director to advise of their position as to whether this action should be stayed under 11 U.S.C. §362 or whether it should be permitted to proceed against the Insurer on behalf of the named Employers. In a response filed by facsimile on January 31, 2000, the Director advised that the automatic stay provisions should not apply. However, the Employers/Insurers argued in their letter responses of February 7 and 10, 2000 (filed on February 9 and February 14, respectively) that this action should be stayed. Claimant argued in a response dated February 10, 2000 (filed on February 14, 2000) that this case should proceed based upon the Insurer’s acknowledgment of coverage.

On March 28, 2000, I issued an Order Denying Plea in Abatement, Lifting Stay of Proceedings, Joining Insurer, and Scheduling Proceedings. In that Order, which is incorporated by reference herein, I denied the Trustee’s plea in abatement under 11

U.S.C. § 362; I lifted the stay of proceedings instituted by my Order of January 6, 2000; I joined Insurer International Business & Mercantile Reassurance Co. as a party; and I set up a briefing schedule. Claimant had previously filed his closing argument/brief on January 18, 2000. The Director's and Employer/Insurer's briefs were filed by mail on May 19, 2000 and May 22, 2000, respectively.

The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, including all documentary evidence admitted, arguments made, and the testimony presented. Where pertinent, I have made credibility determinations concerning the evidence.

STATEMENT OF THE CASE

Claimant William L. Tapper ("Claimant") filed this, his first claim for black lung benefits, on August 8, 1997. He indicated his date of birth was May 26, 1931, and he asserted that he had worked in coal mining for 32 years, quitting in June 1991 because of medical problems. (DX 1). On October 21, 1997, the district director denied the claim because, although the evidence showed that the Claimant had pneumoconiosis caused at least in part by coal mine work, it did not show that he was totally disabled by the disease. (DX 18). Following an informal conference held on February 13, 1998, the claim was again denied. (DX 49). Claimant requested a hearing and this matter was referred to the Office of Administrative Law Judges for a formal hearing on October 27, 1998. (DX 51, 59-60). As stated above, the formal hearing was held before the undersigned on June 17, 1999 in Johnstown, Pennsylvania.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Issues/Stipulations

The issues presented for resolution[4] are:

1. Whether the Claimant has pneumoconiosis;

2. Whether the pneumoconiosis arose out of coal mine employment;

3. Whether the Claimant is totally disabled;

4. Whether pneumoconiosis caused or contributed to his total disability;

5. Length of coal mine employment; and

[4]Only the issue of total disability is contested by the Director. (DX 59, Tr. 25-26).

6. Timeliness of the claim.

(DX 59). At the hearing, the Employer/Insurer indicated that the responsible operator issue was not being contested at that time, but counsel explained that there was some question as to the relationship between the various entities known as "Doverspike" and their insurers. (Tr. 6-12, 26-28). At the end of the hearing, Employer moved for dismissal of Doverspike Brothers, Inc., based upon Claimant's testimony. Although I did not grant the motion, it effectively added the issue of "Responsible Operator" to those listed above. (Tr. 95-110, 121-23). However, there is no need to amend the list of issues due to a subsequent admission by Employer/Carrier.[5]

At the informal conference, the parties agreed that the Claimant was a coal miner, that he was so employed after December 31, 1969, and that he had one dependent (his spouse Donna). They also agreed that the Claimant's last coal mine employer for which he worked at least one year was Doverspike Brothers, Incorporated, and the district director indicated that he worked there from February 12th, 1979 through June 19th, 1992. (DX 49). The Director indicated that the Social Security records established 35 years between 1950 and June 19, 1992, and the Claimant agreed with the 35 year figure. However, the Employer/Carrier agreed to only 13 years of coal mine employment, from February 1979 until June 1992. (DX 49, 59; Tr. 33).

Testimony and Related Exhibits

Claimant's Testimony

Claimant testified that he was born on May 26, 1931 and was 68 years old at the time of the hearing. (Tr. 29). He testified that he was married to Donna Lou Tapper, and that they had been married since 1951. (Tr. 29-30). He indicated that he was not receiving any Federal or state benefits or pension, although he was receiving a monthly payment from the profit sharing plan of Doverspike Coal Company. (Tr. 31). Claimant estimated that he worked for 31 years in coal mine employment, beginning in the 1950's for Northwestern Mining Exchange and ending with his employment with Doverspike Coal Company in 1992. (Tr. 31-41, 75-76). His coal mine employment was summarized on notes that he made (marked and admitted into evidence as ALJ 1):

1) Northwestern Mining & Exchange Co., Stump Creek	1950-51, 1956-59 (3 years & 4 months)
2) Aniseley Coal Co., Reynoldsville, PA	1962 (4 months)

[5] As discussed infra, Employer/Carrier's' counsel advised that the entity that employed Claimant when he worked for Doverspike, regardless of its name, was insured through International Business & Mercantile at the time of Claimant's employment there. (ALJ 2).

3) St. Marys Coal & Gravel Co., Inc., St. Marys, PA	1963 (4 months)
4) Ring Gold Mines, Inc., Kittanning, PA	? - 1966 (1 yr. & 3 mos.)
5) Markle-Bullers Coal Co., Kittanning, PA	1966-69 (2 yrs. & 4 mos.)
6) United Industries, Inc. Kittanning, PA	1969-72 (2 yrs. & 5 mos.)
7) Pa. Mines Corp. [PMC], Ebensburg, PA	1972-74 (2 yrs. & 5 mos.)
8) Emanuel Coal Company, Johnstown, PA	1978-79 (2 years)
9) Doverspike Bros. Coal Company, Punxsutawney, PA	1979-88, 1990-92 (13½ years)
10) Self-Employed (coal truck driver)	1960-62 (3 years)

(ALJ 1, Tr. 34-40, 75-76). All of the employment was in underground coal mining. Claimant testified that he retired from all coal mining in June of 1992 and he has not done any other work for pay since. (Tr. 40-41). For Doverspike Brothers, his last employer, he worked as a roof bolter for 10 years and he ran the shuttle car for 3 ½ years. (Tr. 41). As a shuttle car operator, he had to move the continuous miner around and he loaded very heavy electrical cables, which required two shuttle car operators to move them, and he also had to change tires and do other maintenance and repair work. (Tr. 41-43, 46-47, 55). As a roof bolter, he set roof bolts (or timbers) to hold up the roof. (Tr. 43-44). Claimant described the conditions as "very dusty" and he indicated that he had to work near the face of the coal. (Tr. 45-48). When he came home, his clothes were covered in coal dust. (Tr. 49, 55). Although he wore a respirator about 25 percent of the time, it would clog up, making it difficult to breathe. (Tr. 48-49). The height of the tunnels ranged from 36 to 40 inches and he was required to crawl on his hands and knees, and his work also involved carrying, lifting, reaching, bending, stooping, and squatting. (Tr. 47-48, 55-56). When he operated a coal truck, he had it loaded at the tipple, and he was required to scoop up the coal that was spilled by the shovel operator. There was "lots of coal dust in the air." The truck was also unloaded at the tipple, where it was crushed, which was also a dusty operation. (Tr. 51-56).

Claimant testified that he had "lots of coughing at night", that he would sometimes "cough up stuff", that he had difficulty breathing, and that he had shortness of breath. These symptoms dated for approximately ten years. (Tr. 57-58). His cough and shortness of breath seem to have worsened since he left the mines, and he is unable to do much activity, such as mowing the grass, walking up steps without stopping, walking three city blocks at a normal rate of speed, or carrying 15 pound bags of groceries. (Tr. 60-61). He

can no longer take care of his car or go hunting and fishing, and he needs to sit on a chair in the shower because he gets "tired and out of breath." (Tr. 62-64). He sleeps with his head propped on a large pillow or he sleeps in a recliner. (Tr. 62).

Claimant testified that he was a former smoker, having smoked for approximately 41 years for an average of one half pack per day, from 1944 to 1985 (less periods of six months and two years duration when he quit smoking). (Tr. 58-59; ***see also*** ALJ 1). On cross examination, he indicated that he had smoked Lucky Strikes for a few years, then Trues, and Kents for the last 15 years. (Tr. 68). He also admitted that he told Dr. Gerhard that he smoked a pack of cigarettes per day from 1948 to 1982. (Tr. 76-77).

Claimant's treating physician for his shortness of breath and coughing has been Dr. Shirish Shah in Dubois for the past five or six years, and he was examined by Dr. Schaaf in Erie, whom he has been seeing every three months for the past year and a half. (Tr. 64-66, 71-74, 80-81). His medications (also listed on ALJ 1) are Albuterol Inhaler, Atrovent Inhaler, Theo (breathing pill), Prinivil, and Lodine (for arthritis). (Tr. 66-67, 79-80). On cross examination, Claimant admitted to having had back surgery in 1996, seven damaged discs, and a plate in his back. Initially he admitted that his back problems have decreased his mobility, and he is hunched over due to arthritis, but he then maintained that his back was not really bothering him that much. (Tr. 78-79). He indicated on redirect that he left Doverspike because of his breathing problems, not because of his back problems. (Tr. 85-86).

Although initially excused, Claimant was recalled to the stand and asked about his employment with the Doverspike entities. He testified that he worked for Doverspike Coal Company in Punxsutawney, and on his employment histories he indicated that the name of the employer was "Doverspike Brothers Coal Company" in Punxsutawney. (Tr. 99-100). Claimant did not know that there was a Doverspike Coal Company and also a Doverspike Brothers, Inc.; all he knew was that there was a Doverspike Coal Company. (Tr. 103).

Claimant's Wife's Testimony

Donna Tapper testified that she was married to the Claimant. (Tr. 89). She testified that she observed her husband becoming short of breath when he engaged in certain activities, such as work around the house, and he no longer went hunting or fishing. (Tr. 89-92).

Medical Evidence

The medical evidence consists of x-ray interpretations, pulmonary function studies, arterial blood gases, and medical records and reports.

X-ray Evidence. The record contains the interpretations of x-rays taken on

September 3, 1993, August 8, 1994, October 19, 1995, October 17, 1996, September 9, 1997, November 17, 1997, January 19, 1998, March 19, 1998, March 15, 1999, and June 10, 1999. (DX 14, 15, 34, 38, 39, 41, 48, 63, 64). The preponderance of the readings, including those by the most qualified readers who are dually qualified as B-readers and board-certified radiologists, are positive for simple pneumoconiosis of 1/1 to 2/2 profusion. There were two readings that were positive for complicated pneumoconiosis, category A. The first, a reading of a September 9, 1997 x-ray by a board-eligible radiologist, Dr. Robert S. Boron, was positive for complicated pneumoconiosis, but that same x-ray was reread as showing only simple pneumoconiosis by two B-readers, one of whom was dually qualified (Dr. Shiv Navani), and a later (June 10, 1999) x-ray was interpreted by Dr. Boron as showing only simple pneumoconiosis. The second complicated pneumoconiosis reading -- a reading of a November 17, 1997 x-ray by a dually qualified reader, Dr. Stephen N. Fisher – was read by three other readers, who did not find complicated pneumoconiosis. Moreover, later x-rays (taken on January 18, 1998 and June 10, 1999) were found to be positive for only simple pneumoconiosis by an equally qualified reader, Dr. Navani (although Dr. Navani noted some coalescence of small pneumoconiotic opacities (DX 48, 64).

CT Scans. There were two CT scans. The first, taken on October 21, 1997, was interpreted by Dr. George Alajaji, a radiologist, as showing "multiple small noncalcified 2 to 4 mm nodules" in the upper lobes and significant pleural thickening and scarring, with findings suggestive of silicosis superimposed upon chronic obstructive pulmonary disease, and no masses (CX 1, **see also** DX 43). The second, taken on May 22, 1998, was interpreted by Dr. G. Ali Shah as showing interstitial fibrotic changes and irregular densities, probably scarring, most marked in right upper lung with no consolidation, pleural effusion or mass lesion. (CX 1, ***see also*** DX 47).

Pulmonary Function Tests. The record also contains pulmonary function studies which were performed on September 9, 1997, November 17, 1997, January 19, 1998, March 19, 1998, and July 1, 1999. (DX 8, 34, 38, 41, 63). None of the tests produced qualifying values, although certain values were not normal, as discussed infra. Dr. Fino found a reduction in the diffusing capacity and mild respiratory impairment based upon the March 19, 1998 test.

Arterial Blood Gas Tests. The record also contains the arterial blood gas tests which were administered on September 9, 1997 (rest and exercise), March 19, 1998 (rest), and July 1, 1999 (rest and exercise) (DX 13, 41, 63). None of the tests produced qualifying values.

Medical Opinions. The record also contains the following medical opinions:

(1) **G.H. Gerhart, M.D.**, who is board certified in internal medicine, performed the Department of Labor examinations on September 9, 1997 and July 1, 1999. In his

somewhat illegible examination report of September 9, 1997, he indicated that the Claimant had Pneumoconiosis and Emphysema due to cigarette smoking and coal mine employment, as well as a back condition, but he assessed both the pulmonary disease and the impairment attributable to pneumoconiosis as "mild." A cardiac stress test performed in connection with the latter examination had to be terminated due to fatigue, shortness of breath, and mild chest pain. In his partially illegible report of July 1, 1999, Dr. Gerhart diagnosed only mild COPD (chronic obstructive pulmonary disease) (apparently based upon his own finding no significant abnormalities on the chest x-ray)[6] and he appears to have characterized the impairment as "mild" although his comments are not entirely legible.[7] (DX 12, 62, 63).

(2) **Macy I. Levine, M.D.**, who is board certified in internal medicine and the subspecialty of allergy, conducted a November 19, 1997 evaluation. Dr. Levine opined that the Claimant had pneumoconiosis due to coal dust, chronic bronchitis, and hypertension; that he was "totally and permanently disabled because of pneumoconiosis due to coal dust" and would be unable to perform his last job in the coal industry without significant shortness of breath; and that cigarette smoking is partly responsible for his symptoms and disability but that pneumoconiosis was a substantial factor. (DX 34, 34A; CX 3).

(3) **John T. Schaaf, M.D.**, who is board certified in internal medicine with a subspecialty in pulmonary disease and critical care, examined the Claimant on January 19, 1998. His impressions were coal workers pneumoconiosis, chronic bronchitis related in large measure to coal mine employment, and lung function impairment due to coal workers pneumoconiosis, and he determined that the Claimant was disabled from coal mine employment and all other employment as a result of dyspnea due to coal workers pneumoconiosis. (DX 38). In a June 12, 1998 supplemental report, based upon an examination of the same date, Dr. Schaaf suggested that it was "highly likely" that abnormalities reflected on a May 22, 1998 CT scan (showing nodular densities up to 5 millimeters in diameter) were due to progressive massive fibrosis, but he suggested followup for the possibility of lung cancer. (DX 47). Dr. Schaaf also diagnosed coal workers pneumoconiosis and chronic bronchitis in examination reports of November 23, 1998 and March 15, 1999, and he noted that the abnormal chest x-ray had not changed and that a mass density in the right upper lung zone may represent complicated

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[6] Although Dr. Gerhart's reading is not of record, an x-ray interpretation of the June 10 1999 x-ray by board-eligible radiologist Robert J. Boron found pneumoconiosis 1/1, q/t, upper 4 zones, as well as emphysema and coalescence of small pneumoconiotic opacities. (DX 63).

[7] Dr. Gerhart's abbreviated comments concerning the etiology of the diagnosis and the contribution of the diagnosis to the impairment were not legible. (DX 63).

pneumoconiosis.[8] (CX 2). Dr. Schaaf further elaborated on the basis for his opinions at his August 9, 1999 deposition. (CX 4).

(4) **Gregory J. Fino, M.D.,** who is board certified in internal medicine with a subspecialty in pulmonary disease, examined the Claimant on March 19, 1998. In an April 30, 1998 report, he opined that the Claimant had coal workers' pneumoconiosis, that there was a mild reduction in the diffusing capacity due to pneumoconiosis, that there was mild respiratory impairment present, and that the Claimant was neither partially nor totally disabled from returning to his last mining job or a job requiring similar effort. (DX 41, 61). Although originally planned, Dr. Fino's deposition was apparently not taken, as discussed above.

(5) **Shirish M. Shah, M.D.**, was the Claimant's treating physician and a board certified general surgeon. In a report dated May 21, 1998, he stated his belief that the Claimant had simple coal worker's pneumoconiosis (CWP) caused by coal dust inhalation; that he might also have chronic obstructive lung disease, which is sometimes secondary to black lung disease; that his simple CWP is "a significant contributing factor to his pulmonary and respiratory impairments; that he "simply does not have the respiratory and back ability to perform those jobs that he did in the past and which required bending, crawling, stooping, lifting, carrying, climbing, etc."; and that, based upon reasonable medical certainty, Claimant "has pneumoconiosis and is disabled by that disease." (DX 43).

Discussion and Analysis

The Supreme Court has made it clear that the burden of proof in a black lung claim lies with the claimant, and if the evidence is evenly balanced, the claimant must lose. In ***Director, OWCP v. Greenwich Collieries***, 512 U.S. 267, 28 BRBS 43 (CRT) (1994), the Supreme Court invalidated the "true doubt" rule, which gave the benefit of the doubt to claimants. In order to prevail in a black lung case, a claimant miner must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that the total disability was due to pneumoconiosis and/or his coal mine employment-related dust exposure. 20 C.F.R. Part 718. ***See also, e.g.***, ***Gee v. W.G. Moore & Sons***, 9 BLR 1-4 (1986) (***en banc***). A claimant must now establish each of these elements by a preponderance of the evidence.

Timeliness of Claim

[8] Dr. Shaaf did not include a finding of large opacities, complicated pneumoconiosis, or coalescence on the March 15, 1999 ILO form relating to his interpretation of the March 15, 1999 x-ray. (CX 2).

Under the provisions of 20 C.F.R. § 725.308, a claim for black lung benefits under the Act shall be filed within three years after a medical determination of total disability due to pneumoconiosis has been communicated to the miner, or within three years after the enactment of the Black Lung Benefits Reform Act of 1977, whichever is later. There is a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. § 725.308(c). Here, no evidence has been submitted to show that the Claimant was given a medical determination of total disability three years before he filed his claim in August 1997. Accordingly, I find that the presumption of timeliness has not been rebutted and that the claim was timely filed.

Length of Coal Mine Employment/Responsible Operator

Based upon the Claimant's testimony and written summary of coal mine employment, discussed above, as corroborated by his other written submissions, the Social Security records, and attestations by various coal mine operators, I find that the Claimant has established 31 years of coal mine employment during the period from 1950 to 1992. (Tr. 31-41; ALJ 1; DX 2 to DX 8).

I further find that the Claimant's last and usual coal mine employment was as a shuttle car operator and roof bolter for Doverspike Brothers Coal Company, Punxsutawney, Pennsylvania; that his employment there extended from February 12th, 1979 to June 19th, 1992; and that Doverspike Brothers Coal Company (Employer Number 25-1142646) is the properly named responsible operator. By counsel's letter of September 27, 1999, Employer has verified that International Business & Mercantile provided coverage for this entity for the period from August 22, 1991 through August 22, 1992, when Claimant was so employed there. (ALJ 2). The evidence as a whole establishes that the Claimant was employed by Doverspike Brothers Coal Company and that any liability attributable to that company is the obligation of its insurance carrier, International Business & Mercantile Reassurance Co.[9]

Existence of Pneumoconiosis

Section 718.201 defines pneumoconiosis as a "chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 20 C.F.R. § 718.201. ***See also*** 30 U.S.C. § 902(b). As defined in the regulation, pneumoconiosis is not confined to "coal workers' pneumoconiosis," but it also includes other diseases arising out of coal mine employment, such as silicosis, anthracosis, or massive pulmonary fibrosis. 20 C.F.R. § 718.201. The term "arising out of coal mine employment" is defined as including "any chronic pulmonary disease resulting in

[9] This matter is addressed in the Director's well reasoned Closing Brief, submitted under cover letter of May 19, 2000 and received on June 2, 2000.

respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." ***Id.*** Thus, under the legal definition of pneumoconiosis, chronic bronchitis or chronic obstructive pulmonary disease would qualify as pneumoconiosis if either were shown to have arisen out of coal mine employment. ***See LaBelle Processing Co. v. Swarrow***, 72 F.3d 308, 315 (3d Cir. 1995). ***See also Glen Coal Company v. Seals***, 147 F.3d 502, 508 (6th Cir. 1998); ***Stiltner v. Island Creek Coal Co.***, 86 F.3d 337 (4th Cir. 1996); ***Blakely v. Amax Coal Company,*** 54 F.3d 1313, 1320-1321 (7th Cir. 1995).

The regulations provide several means of establishing the existence of pneumoconiosis: (1) a chest x-ray meeting criteria set forth in 20 C.F.R. § 718.102, and in the event of conflicting x-ray reports, consideration is to be given to the radiological qualifications of the persons interpreting the x-rays; (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. § 718.106; (3) application of the irrebuttable presumption for "complicated pneumoconiosis" set forth in 20 C.F.R. § 718.304 and two additional presumptions set forth in § 718.305 and § 718.306; or (4) a determination of the existence of pneumoconiosis made by a physician exercising sound judgment, based upon objective medical evidence and supported by a reasoned medical opinion. 20 C.F.R. § 718.202(a)(1) - (4).

(1) X-ray Evidence. As summarized above, the x-ray interpretations establish pneumoconiosis under section 718.202(a)(1).

(2) Biopsy Evidence. As there is no biopsy of record, the Claimant has failed to establish pneumoconiosis under 20 C.F.R. § 718.202(a)(2).

(3) Complicated Pneumoconiosis and Other Presumptions. A finding of "complicated pneumoconiosis" (***i.e.,*** large opacities greater than one centimeter) under 20 C.F.R. § 718.304 results in an irrebuttable presumption of total disability. As summarized above, the preponderance of the x-ray readings do not establish complicated pneumoconiosis as so defined, although some coalescence of small opacities may be occurring, as indicated by Dr. Navani. Although Dr. Schaaf has used the CT scans to suggest complicated pneumoconiosis, the CT scans have not been interpreted as showing opacities of more than 5 millimeters in diameter; however, the regulations require that the opacities be greater than one centimeter (or 10 millimeters). Thus, the section 718.304 presumption is inapplicable. The additional presumptions mentioned in section 718.202(a)(3), which are set forth in 20 C.F.R. § 718.305 and 20 C.F.R. § 718.306 are also inapplicable, ***inter alia***, because they do not apply to claims filed after January 1, 1982 or June 30, 1982, respectively.

(4) Medical Opinions. A claimant may prove the existence of pneumoconiosis, notwithstanding negative chest x-ray findings under 20 C.F.R. § 718.202(a)(1), if a physician exercising sound medical judgment finds that the miner suffers from

pneumoconiosis as defined in section 718.201. The regulation specifically provides that: "Any such finding shall be based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion." 20 C.F.R. § 718.202(a)(4).

As noted above, the record contains the medical opinions of Drs. Gerhart, Levine, Schaaf, Fino, and Shah. With the possible exception of Dr. Gerhart, whose most recent report is difficult to read, each of these doctors has found the Claimant to have coal worker's pneumoconiosis and/or chronic bronchitis/COPD attributable to his coal mine employment. To the extent that Dr. Gerhart's recent report may be deemed to have reached a conclusion that the Claimant does not have coal workers' pneumoconiosis, it is based upon his own interpretation of the x-ray, which is outweighed by the interpretations of more qualified readers, and Dr. Gerhart's unclear opinion is outweighed by the better-articulated opinions of the other four doctors. Accordingly, the existence of pneumoconiosis has been established by the medical evidence under section 718.202(a)(4).

Taking into account all of the evidence, I find that the Claimant has established pneumoconiosis under 20 C.F.R. § 718.202(a) as a whole, based upon the medical opinion evidence and x-ray evidence, considered along with the other evidence of record. ***See generally Penn Allegheny Coal Co. v. Williams,*** 114 F.3d 22 (3d. Cir. 1997). ***See also Island Creek Coal Co. v. Compton***, 211 F3d 203 (4th Cir. 2000).

Relationship to Coal Mine Employment

Because the Claimant has established the existence of pneumoconiosis, he is entitled to the presumption that the disease arose from his more than ten years of coal mine employment, and I so find. I further find that the presumption has not been rebutted. ***See*** 20 C.F.R. § 718.203.

Existence of Total Disability

The issue of total disability is the crux of the instant case. As noted above, it is the only issue contested by the Director.

The regulations provide that a claimant can establish total disability by showing pneumoconiosis prevented the miner "[f]rom performing his or her usual coal mine work," and "[f]rom engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time." 20 C.F.R. § 718.204(b). Where, as here, the Claimant cannot establish complicated pneumoconiosis, total disability may be established by pulmonary function

tests, arterial blood gas tests, evidence of cor pulmonale with right sided congestive heart failure, or physicians' reasoned medical opinions, based on medically acceptable clinical and laboratory diagnostic techniques, to the effect that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in the miner's previous coal mine employment. 20 C.F.R. § 718.204(c). It may not be established solely by the miner's testimony or statements. 20 C.F.R. § 718.204(d)(2).

(1) Pulmonary Function Tests. None of the pulmonary function studies are qualifying. Therefore, Claimant has failed to establish total disability pursuant to section 718.204(c)(1).

(2) Arterial Blood Gases. As noted above, none of the arterial blood gases produced qualifying values. Accordingly, the Claimant has failed to establish total disability pursuant to section 718.204(c)(2).

(3) Cor Pulmonale and Congestive Heart Failure. There has been no diagnosis of cor pulmonale or congestive heart failure. Therefore, the Claimant cannot establish total disability pursuant to section 718.204(c)(3).

(4) Medical Opinion Evidence. Finally, while the evidence is conflicting on this issue, I find that the preponderance of the medical opinion evidence establishes the presence of a totally disabling respiratory or pulmonary impairment. In this regard, the doctors expressing opinions disagreed as to whether the Claimant is totally disabled, with Drs. Levine, Schaaf and Shah finding that he is while Drs. Fino and Gerhart did not. Dr. Fino, a highly qualified pulmonologist, found that the Claimant retained the respiratory capacity to perform his last coal mine work, although he acknowledged some (mild) impairment due to the reduction in diffusing capacity caused by coal mine employment. In reaching his conclusions, however, Dr. Fino assumed that the Claimant was five years older than he actually was, a fact that may have influenced his opinion as to degree of disability. Although Dr. Gerhart's findings are essentially the same as Dr. Fino's – a "mild" impairment[10] – Dr. Gerhart does not appear to have squarely addressed the issue of the Claimant's ability to perform his last coal mine work. Dr. Gerhart's reports are not entirely legible on critical matters, and are not entitled to much weight for that reason. Dr. Schaaf, also a highly qualified pulmonologist, concluded that the Claimant was, in fact, totally disabled from performing his coal mine work. Drs. Levine and Shah also found total disability, although Dr. Levine found it to be partly attributable to smoking and Dr. Shah

[10] In his most recent examination report, Dr. Gerhart listed "Mild COPD" under the Cardiopulmonary diagnoses box and "Mild [disability(?)] FEF 25-75% on [pulmonary function(?)] ABG's [Normal(?)] [Normal chest(?)] Stress [test(?)]" under Impairment. (DX 63). Illegible initials appear in the portions of the report relating to the etiology of the diagnoses and the contribution of the diagnoses to impairment.

found it to be partly attributable to the Claimant's back injury as well as smoking. Dr. Shah, as the Claimant's treating physician, is perhaps in the best position to assess his capabilities, and Dr. Schaaf, who has followed Claimant over a period of time, has an advantage based upon that factor. I find Dr. Schaaf's opinion, as set out in detail in his reports and at his deposition, and as corroborated by Drs. Levine and Shah, to be the best documented and reasoned and to therefore outweigh that of Dr. Fino and Dr. Gerhart. ***See Fields v. Island Creek Coal Co.,*** 10 BLR 1-19, 1-22 (1987) ("documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis and "reasoned" opinion is one in which the underlying documentation is adequate to support the physician's conclusions.) Dr. Schaaf's opinion explains and takes into consideration the nature of the work that Claimant had to do in his last coal mine job as a shuttle car operator as compared with the activities he is now capable of performing, as Claimant described to Dr. Schaaf (and also discussed at the hearing before me and in his written submissions). (***See*** DX 3; CX 4 at 11 to 18, 55 to 58). While the regulatory criteria for pulmonary function and arterial blood gas testing were not met, the values were not normal either, as discussed by Dr. Schaaf at his deposition, and there were other abnormalities shown on lung function testing (such as a reduction in the diffusing capacity for carbon monoxide [or DLCO], the MVV [or maximum breathing capacity], and the FEF 25%-75% [or MMFR] values) that reflected the Claimant's decreased lung function. (CX 4 at 29 to 38, 40 to 43, 47-51). Dr. Schaaf's discussion of these matters is highly persuasive and I adopt his opinion. Thus, I find that the Claimant has established total disability based upon the medical opinion evidence pursuant to section 718.204(c)(3).

Turning to section 718.204(c) as a whole, I find that the Claimant has established total disability. I note that, while the cases in which a claimant may establish total disability with nonqualifying pulmonary function and arterial blood gas tests may be few, this is such a case. My rationale is based upon the medical opinion evidence discussed above, and particularly Dr. Schaaf's deposition testimony, considered along with the Claimant's testimony and written submissions concerning the nature of his coal mine employment. It is also worth noting that the Claimant has testified that his activities are severely limited due to shortness of breath dating from approximately three years before he left the coal mines and leading to his leaving the mines. (Tr. 57-64, 85-86). Moreover, an exercise cardiac stress test had to be terminated at the time of the most recent examination due to the Claimant's fatigue, shortness of breath, and mild chest pain. (DX 63). Claimant would clearly be incapable of performing his last or usual coal mine work, which was heavy in nature, based upon his respiratory condition alone. Taking all of the evidence of record into consideration, I find that the Claimant has established total disability based upon the medical opinion evidence under section 718.204(c)(4), as well as under section 718.204 (c) as a whole.

Relationship of Total Disability to Coal Mine Employment

That does not end the matter, however, as the Claimant must still establish that his total disability was caused at least in part by his coal mine employment. According to the Benefits Review Board, if the presumptions are not available to a claimant, that claimant must prove the etiology of the disability by a preponderance of the evidence, even if he or she has proven the existence of total disability. ***See Tucker v. Director,*** 10 BLR 1-35, 1-41 (1987). In ***Bonessa v. U.S. Steel Corp.,*** 884 F.2d 726, 734 (3d Cir. 1989), the United States Court of Appeals for the Third Circuit found that to establish total disability due to pneumoconiosis under 20 C.F.R. § 718.204, a claimant must show the disease is a substantial contributor to the disability. In ***Bonessa***, the Court of Appeals for the Third Circuit recognized that "a miner seeking benefits must show that he is totally disabled not merely by a respiratory or pulmonary condition but by pneumoconiosis" but noted that it was unnecessary to show that the miner's total disability was due solely to pneumoconiosis. ***Id.*** at 729, 731. ***See also Beatty v. Danri Corp. & Triangle Enterprises,*** 49 F.3d 993 (3d Cir. 1995).

Based upon my thorough analysis of all of the evidence, I find that Claimant's totally disabling respiratory or pulmonary impairment is due to his coal workers' pneumoconiosis. Each of the physicians expressing an opinion in this case – Drs. Gerhart, Levine, Schaaf, Fino, and Shah – at one time attributed at least a portion of the Claimant's impairment to coal mine employment. Dr. Schaaf, a board-certified pulmonologist, found the Claimant to be totally disabled due to coal worker's pneumoconiosis alone, and he explained the basis for his opinion in some detail at his deposition. (CX 4). I do not find Dr. Schaaf's assumptions concerning the Claimant's smoking history to be inconsistent with the Claimant's credible testimony before me.[11] (***Compare*** DX 38, CX 4 at p. 83 ***with*** Tr. 58-59, ALJ 1). Dr. Schaaf's opinion is corroborated by Dr. Shah, who found simple CWP to be "a significant contributing factor" to Claimant's "pulmonary and respiratory impairments" (which he also found related to smoking) and, while he also found the Claimant's back problem to be a cause of his disability, Dr. Shah ultimately stated his medical opinion that the Claimant "has pneumoconiosis and is disabled by that disease." (DX 43). Dr. Schaaf's opinion is also corroborated by that of Dr. Levine, who, while finding the impairment to be partly attributable to smoking, opined that pneumoconiosis was "a substantial factor in producing both his symptoms and his disability." (DX 34). As before, I find Dr. Gerhart's reports are not entitled to much weight due to their illegibility on critical matters, and while the earlier report attributed a portion of the impairment to coal mine employment, I am at a loss in deciding what the most recent one did as I cannot read that portion of it. In any event, to the extent that Dr. Gerhart has found no coal worker's pneumoconiosis, I reject his opinion. (DX 12, 63). While Dr. Fino, also a board-certified pulmonologist, did not find the Claimant to be totally disabled, he attributed such

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[11] It appears likely that any discrepancies in the recorded smoking histories are based upon unfounded assumptions that the Claimant's smoking was uninterrupted and was one pack per day.

impairment as he did find (a mild reduction in diffusing capacity) to the Claimant's pneumoconiosis. (DX 41). Looking at all of these opinions, I find that there is no real dispute among the doctors (with the possible exception of Dr. Gerhart) on the issue of whether the Claimant's coal mine employment and resulting pneumoconiosis was a significant factor in causing such disability as he now has. As noted above, I have found the Claimant to be totally disabled. Accordingly, I find that Claimant has established that his pneumoconiosis was substantial contributor to his total disability.

Conclusion

In view of the above, I find that the Claimant has established that he has pneumoconiosis arising from his coal mine employment and that he is totally disabled due to pneumoconiosis. He is thus entitled to benefits under the Act.

Effective Date

Under 20 C.F.R. § 725.503(b), the date for commencement of benefits is "the month of onset of total disability" but "[w]here the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed." As the evidence does not specifically establish a month of onset, benefits shall commence as of August 1997, the month the claim was filed. ***See generally*** 20 C.F.R. § 725.503(b).

ATTORNEY'S FEE

No award of an attorney's or representative's fee is made herein because no fee application has been received. ***See*** 30 U.S.C. § 932; 33 U.S.C. § 928. The Claimant's attorney shall have thirty days for submission of a fee application in conformance with 20 C.F.R. Part 725 and the other parties shall have thirty days to file any objection.

ORDER

IT IS HEREBY ORDERED that Claimant William L. Tapper's claim for benefits under the Act be, and is, hereby **GRANTED** and benefits shall be payable under the Act, by International Business and Mercantile Reassurance on behalf of the Employer, augmented by one dependent, commencing as of August 1, 1997.

PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.